No. 75-1844

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

EUGENE LOVASCO, SR.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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CITATIONS

Cases:

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The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-11a) is reported at 532 F. 2d 59.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 12a) was entered on February 23, 1976. On

April 21, 1976, the court of appeals denied a petition for rehearing, with suggestion for rehearing *en banc* (App. C, *infra*, p. 13a). On May 11, 1976, Mr. Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including June 20, 1976 (a Sunday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a defendant who seeks the dismissal of an indictment because of pre-accusation delay must show that the government sought the delay to secure an improper tactical advantage as well as that the delay impaired his ability to defend against the charges.

2. Whether, barring exceptional circumstances, a district court should reserve ruling on a due process claim based upon pre-accusation delay until after trial, at which time the defendant's allegations of prejudice can be assessed in light of the evidence introduced at trial.

STATEMENT

Respondent was indicted on March 6, 1975, in the United States District Court for the Eastern District of Missouri on three counts of unlawful possession of materials stolen from the mails, in violation of 18 U.S.C. 1708, and on one count of engaging in the business of dealing in firearms without a license, in violation of 18 U.S.C. 922(a)(1) and 924(a). The indictment referred specifically to eight handguns

that respondent allegedly had possessed and sold between July 25 and August 31, 1973.

On March 18, 1975, respondent moved—pursuant to Rule 48 of the Federal Rules of Criminal Procedure and the Sixth Amendment[1]—to dismiss the indictment. He alleged in his motion that (1) the government had completed its investigation of the matters referred to in the indictment on September 26, 1973; (2) the government thereafter had delayed presenting its evidence against him to the grand jury for a period of approximately eighteen months; (3) the delay in presenting such evidence was unreasonable; and (4) the delay had prejudiced him by causing him to suffer anxiety and concern. Respondent made no allegation that the government had sought the delay to secure an improper tactical advantage, and he made no effort to particularize the respects in which the delay had impaired his ability to defend against the charges.

On April 25, 1975, the district court held a hearing on respondent's motion to dismiss. The government stipulated at the outset of the hearing that respondent had been interviewed by a postal inspector in September 1973 concerning a series of thefts from a mail facility operated by the Terminal Railroad Association in St. Louis, Missouri (H. Tr. 4).

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[1] Since respondent did not become an "accused" until he was indicted on March 6, 1975, his reliance upon Rule 48 and the Sixth Amendment was obviously misplaced. See *Dillingham* v. *United States*, 423 U.S. 64 (*per curiam*); *United States* v. *Marion*, 404 U.S. 307, 313, 319.

The government also stipulated that, although investigation of the thefts had continued thereafter, only one witness had been discovered following respondent's interview who might have bolstered the government's case against him (H. Tr. 4-5).

In support of his allegation that the government had sufficient evidence as of September 1973 to warrant presenting the case against him to the grand jury at that time, respondent introduced at the hearing a report that had been prepared by Postal Inspector G. P. Wellner. The report was dated October 2, 1973, and had been forwarded to the United States Attorney at that time (H. Tr. 19). The report indicated that between August 20 and September 5, 1973, government agents had purchased four semi-automatic pistols from David Northdurft and Martin Koehnken. These pistols had been sold by the Browning Arms Company to various retailers but had been stolen prior to their receipt by the retailers, after mailing from a Terminal Railroad Association facility in St. Louis. Government agents arrested Koehnken on September 11, at which time they seized four additional stolen handguns.[2] Subsequent investigation revealed that Koehnken had purchased the guns from Joe Boaz. Boaz was interviewed on September 24, 1973, and admitted that he had known that the guns were "hot" when he sold them to

[2] Koehnken subsequently pleaded guilty to a single count charging him with having engaged in the business of dealing in firearms without a license, in violation of 18 U.S.C. 922(a)(1) and 924(a).

Koehnken. Boaz also stated during the interview that he had obtained all eight guns from respondent between July 26 and September 11, 1973.

Respondent, a switchman for the Terminal Railroad Association, was interviewed on September 26, 1973. He claimed that after having visited his son, a mail handler for the Railroad Association, he had found "four or five" handguns in a sack in the back seat of his automobile. He admitted selling the guns he had found to Boaz, but he specifically denied having sold Boaz all eight of the guns that had been purchased or seized from Koehnken. The report also indicated that respondent would not have had access to insured mail parcels in the normal course of his duties as a switchman and that, although his son would have had such access and had endorsed three of the four checks that Boaz had given respondent as payment for the guns, the postal inspectors had no direct evidence at that time that respondent's son was responsible for the thefts.

Respondent testified at the hearing that two "possible" witnesses on his behalf had died during the eighteen-month delay referred to in his motion to dismiss—his brother and Tom Stewart.[3] He testified that his brother, who had worked prior to his death at the same place of business as Boaz, had introduced him to Boaz and had been present when he made ar-

[3] Respondent testified that Stewart had died approximately six months before the date of the hearing and that his brother had died in April 1974, approximately one year before the hearing (H. Tr. 7-8).

rangements by telephone to obtain guns to sell to Boaz (H. Tr. 6-7, 9). Respondent also testified that he had obtained "some of the guns" identified in the indictment from Stewart and that he had arranged to obtain those guns by telephoning Stewart from Boaz's office (H. Tr. 8). On cross-examination, however, respondent stated that he had obtained only "two or three" guns from Stewart in that manner (H. Tr. 9). He conceded further that he had told the postal inspector who had questioned him that he had found some of the guns he had sold in a sack in the back seat of his automobile and that he had not mentioned Stewart's name at that time. He explained that he had not disclosed Stewart's involvement earlier because Stewart "was a bad tomato" and "was liable to take a shot" at him (H. Tr. 9-10). Respondent did not specify at the hearing what exculpatory evidence his brother or Stewart might have provided.[4]

On October 8, 1975—following an aborted attempt by respondent to plead guilty to a misdemeanor[5]—

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[4] Postal Inspector Wellner was also a witness at the hearing and testified that evidence had been presented to the grand jury tending to show that persons in addition to respondent had been involved in the matters charged in the indictment (H. Tr. 21-22). The government earlier had informed the court that its theory of the case was that respondent had received the handguns referred to in the indictment from his son (H. Tr. 11).

[5] On August 8, 1975, respondent attempted to plead guilty to a superseding information charging him with having knowingly and willfully obstructed and retarded the passage of mail matter, in violation of 18 U.S.C. 1701. But during the hearing on the plea, respondent repeated his earlier statement about having found the handgun referred to in the information in an unmarked package in the back seat of his automobile. The government informed the court that "it's our position that if [respondent] didn't know it was mail matter then he cannot enter a plea of guilty to the offense" (Plea Tr. 32), and the court thereafter declined to accept the plea.

the district court entered an order dismissing all counts of the indictment. The court based its dismissal on Rule 48(b) of the Federal Rules of Criminal Procedure, stating in relevant part (App. D, *infra*, p. 14a):

> [A]s of September 26, 1973, and in no event later than October 2, 1973, the Government had all the information relating to [respondent's] alleged commission of the offenses charged against him, but did not charge [respondent] or present the matter to a grand jury until more than 17 months thereafter. * * *
>
> As a result of the delay [respondent] has been prejudiced by reason of the death of Tom Stewart, a material witness on his behalf. The Government's delay has not been explained or justified and we find it unnecessary and unreasonable.

On February 23, 1976, a divided panel of the court of appeals affirmed the dismissal of the three possession counts of the indictment and ordered reinstatement of the count charging respondent with dealing in firearms without a license. The majority (comprised of Justice Clark and Judge Bright) rested its affirmance upon its finding that respondent had es-

tablished "the two basic elements essential to a claim of preindictment delay—unreasonable delay and prejudice to [his] ability to defend against the charges" (App. A, *infra*, p. 5a). Although the majority acknowledged that the delay had been occasioned by the government's desire to identify additional persons who may have participated in the thefts, it nevertheless concluded that the district court's finding that the delay was "unjustified, unnecessary, and unreasonable" was supported by the evidence (*ibid.*). With respect to the district court's finding of prejudice, the majority relied upon respondent's assertion—not made at or supported by the testimony at the hearing on the motion to dismiss—"that were Stewart's testimony available it would support his claim that he did not know that the guns were stolen from the United States mails" (*ibid.*).

Judge Henley dissented from the decision insofar as it upheld the district court's dismissal of the three possession counts, in part for the reasons stated in his dissenting opinion in *United States* v. *Barket*, 530 F. 2d 189, 197-199 (C.A. 8). Judge Henley stressed that "the fifth amendment protection against preindictment or preprosecution delays is not coextensive with the 'speedy trial' protection accorded by the sixth amendment" and that "the subject of a criminal investigation has no constitutional right to immediate prosecution or arrest" (App. A, *infra*, p. 8a). Judge Henley also pointed out that respondent had not offered any evidence tending to show that the delay in obtaining the indictment "was motivated by any sinister desire on the part of the

investigating officers or the United States Attorney to gain a tactical advantage * * *" (*id.* at 8a-9a).[6]

Judge Henley noted additionally that respondent's belated assertion of prejudice as a result of Stewart's death made that assertion highly suspect (*id.* at 9a-10a), and he concluded that, in any event, "the district court's finding that [respondent] sustained prejudice as a result of the death of Tom Stewart was purely speculative and for that reason was clearly erroneous" (*id.* at 9a). According to Judge Henley (*id.* at 11a):

> When a district judge sustains in advance of trial a motion to dismiss an indictment because of prejudicial pre-indictment delay, he takes a stringent measure. And if such a motion is improvidently granted, it adversely affects the public interest in the enforcement of the criminal law, and it also encourages the filing of meritless motions, similarly based, by other defendants. The dismissing of indictments on account of the government's delay in obtaining them is not an acceptable solution to the problem of crowded criminal calendars, and in my opinion motions such as [respondent's] should

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[6] In *Barket, supra*, Judge Henley had stated (530 F. 2d at 198):

> [P]rejudice conceded, my position in a case of this kind is that pre-prosecution delay does not amount to a denial of due process absent a showing of bad faith or improper motive on the part of the government in delaying the prosecution, or a showing of detrimental reliance by a putative defendant on the initial decision of the government not to prosecute.

not be granted in advance of trial except in clear cases.

REASONS FOR GRANTING THE WRIT

In *United States* v. *Marion*, 404 U.S. 307, this Court held that only "a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge * * * engage the particular protections of the speedy trial provision of the Sixth Amendment" (404 U.S. at 320). At the same time, *Marion* acknowledged that pre-accusation delay might in some instances violate the Due Process Clause of the Fifth Amendment and require the dismissal of an indictment. Specifically, this Court referred approvingly to the government's suggestion that the Due Process Clause would require the dismissal of an indictment "if it were shown at trial that the pre-indictment delay * * * caused substantial prejudice to * * * [the accused's] right[ ] to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused" (404 U.S. at 324; footnote omitted).

The decision below represents a marked departure from the criteria suggested by this Court in *Marion* for evaluation of due process claims such as respondent's. It also conflicts in several significant respects with decisions in other circuits dealing with the showing required of a defendant who alleges that pre-accusation delay has offended the Due Process Clause. Most importantly, in this and other recent cases the Eighth Circuit has dispensed with the requirement that a defendant claiming a due process violation because of pre-accusation delay show that the government sought the delay to secure an improper tactical advantage. Dismissal of an indictment is required, under the holdings of the Eighth Circuit, whenever the government fails adequately to justify a particular delay and the defendant is able to demonstrate that the delay prejudiced his ability to defend against the charges. By relieving defendants of any obligation to show that the delay in indictment or arrest stemmed from improper tactical considerations, the decision below ignores significant differences in the policies served by the Due Process Clause and the speedy trial provision of the Sixth Amendment.

Even assuming that the court of appeals was correct in dispensing with any requirement that respondent demonstrate improperly motivated delay as an element of his due process claim, we believe the court erred in attempting to assess that claim prior to trial. Both for reasons of judicial economy and because of the difficulty of evaluating inherently speculative allegations of prejudice without the benefit of the full record developed at trial, it is important that this Court make clear that claims of unconstitutional pre-accusation delay should be resolved—absent extraordinary circumstances—after trial.

1. The panel majority held in this case that the showing required of a defendant claiming a violation of due process because of pre-accusation delay is limited to "two basic elements"—a demonstration that

the delay was "unreasonable" and a showing that it prejudiced the defendant's ability to defend against the charges (App. A, *infra*, p. 5a). The majority then went on to hold that the delay that occurred here was "unreasonable" because "the essential facts underlying the indictment" were known to the prosecutor approximately seventeen months prior to respondent's indictment and "[n]o reason existed for the delay except a hope on the part of the Government that others might be discovered who may have participated in the theft of firearms from the United States mails" (*ibid.*). In an earlier case, *United States* v. *Barket*, *supra*, a panel of the Eighth Circuit had explained that a pre-accusation delay is "unreasonable" under the due process test announced in *Marion* whenever the defendant has been able to show that the delay was caused by "governmental negligence" (530 F. 2d at 195).

The Eighth Circuit's use in the present case and in *Barket* of a negligence standard in assessing the government's responsibility for pre-accusation delay under the Due Process Clause has little in common with the standard of tactically-motivated misconduct approved in *Marion*. In fact, in *Barket* the Eighth Circuit erroneously relied upon *Barker* v. *Wingo*, 407 U.S. 514. for the proposition that negligence or inadvertence by the government, delaying the obtaining of an indictment and prejudicing the defense, violates the Due Process Clause. *Barker* concerned only the right to a speedy trial under the Sixth Amendment, and the court's equation of the government's respon-

sibility before and after a person has been accused of a crime ignores significant differences in the policies served by the Due Process Clause and the speedy trial provision of the Sixth Amendment.

Once a person has been formally accused of a crime, the prosecution and the judiciary are obligated under the Sixth Amendment to proceed with "orderly expedition." *Smith* v. *United States*, 360 U.S. 1, 10. In assessing a Sixth Amendment claim, the finding that a particular delay was "unreasonable" is entitled to weight because the purpose of the speedy trial provision is "to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself" (*United States* v. *Marion*, *supra*, 404 U.S. at 320; quoting from *United States* v. *Ewell*, 383 U.S. 116, 120).

Prior to formal accusation, however, the interests of a potential defendant and of a society concerned with the even-handed enforcement of the criminal laws are quite different. Given limited resources, prosecutors are constantly faced with the task of assigning priorities. It is unfair to characterize as prosecutorial "negligence" the decision to devote available resources to the investigation of some matters at the expense of others, and unrealistic to assume that the stringent measure of dismissing an indictment because of pre-accusation delay will lead to a significant lessening of the time between the commission of offenses and the bringing of indict-

ments—at least insofar as those delays stem from institutional, as opposed to malevolent, considerations. Non-invidious pre-accusation delays are properly tolerated where post-accusation delays would not be, in part because, as this Court pointed out in *Marion*, prior to arrest or charge "a citizen suffers no restraints on his liberty and is not the subject of public accusation; his situation does not compare with that of a defendant who has been arrested and held to answer" (404 U.S. at 321).

The approach of the court of appeals, however, is plainly rooted in the premise that the government has a duty to proceed expeditiously with the investigation and institution of criminal charges, and that a failure to proceed with satisfactory dispatch will render pre-accusation delay unreasonable. This view has serious import for the administration of criminal justice and leads the judiciary down a path that it has heretofore wisely eschewed. Here, for instance, the indictment was dismissed for pre-accusation delay despite the fact, acknowledged by the majority below (App. A, *infra*, p. 5), that the delay was caused by the government's efforts to identify persons in addition to respondent who may have participated in the offenses charged in the indictment.[7] The holding of the court of appeals does not square with this Court's observation in *Hoffa* v. *United*

[7] As noted above, the report submitted to the United States Attorney by Postal Inspector Wellner stated that respondent would not have had access in the normal course of his duties to the mail handling facilities of the Terminal Railroad Association. Although respondent's son did have access to those facilities and had cashed some of the checks that had been given in payment for the stolen handguns, the report further stated that the postal inspectors did not have any evidence showing that respondent's son was responsible for the thefts.

States, 385 U.S. 293, 310—quoted approvingly in *Marion* (404 U.S. at 325, n. 18)—that

> [t]here is no constitutional right to be arrested. The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon, and a violation of the Sixth Amendment if they wait too long. Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction.[8]

A decision to delay presenting evidence to a grand jury pending further investigation often makes sense as well from the perspective of the individual suspected of having committed a crime. Further investi-

[8] See also *United States* v. *Watson*, No. 74-538, decided January 26, 1976. ("Good police practice often requires postponing an arrest, even after probable cause has been established, in order to place the suspect under surveillance or otherwise develop further evidence necessary to prove guilt to a jury.") (Powell, J., concurring, slip op. 6.)

gation may reveal that the person originally under suspicion was not involved or that no criminal offense was committed. See *United States* v. *Finkelstein*, 526 F. 2d 517, 526 (C.A. 2). In either event, the decision to delay seeking an indictment may thus serve to avoid placing the person in the position of having been publicly accused of criminal activity. Even if ultimately indicted, moreover, the delay may shorten the period between the formal bringing of charges and the defendant's opportunity to secure an acquittal on those charges at trial.

The question whether a defendant seeking dismissal of an indictment on grounds that he has been deprived of due process of law by pre-indictment delay must show that the delay was motivated by an attempt by the government to secure improper tactical advantage is one that has divided the courts of appeals. At least two other circuits appear to agree with the Eighth Circuit that a showing of improper motivation for the delay is not essential. *United States* v. *Wilson*, 517 F. 2d 1400 (C.A. 3); *United States* v. *Dukow*, 453 F. 2d 1328, 1330 (C.A. 3), certiorari denied *sub nom. Crow* v. *United States*, 406 U.S. 945; *United States* v. *Giacalone*, 477 F. 2d 1273, 1276-1277 (C.A. 6). On the other hand, at least four circuits do require such a showing. *United States* v. *Duke*, 527 F. 2d 386, 390 (C.A. 5); *United States* v. *Ricketson*, 498 F. 2d 367, 370-371 (C.A. 7); *United States* v. *Beitscher*, 467 F. 2d 269, 272 (C.A. 10); *United States* v. *Daley*, 454 F. 2d 505, 508

(C.A. 1).[9] This disagreement among the circuits is ripe for resolution by this Court,[10] particularly in light of the substantial practical impact of the holding below on the manner in which investigative and prosecutive functions are to be carried out.[11]

2. The decision below also departs from previously accepted standards by endorsing a procedure for resolving due process claims based upon pre-accusation delay that, in practical effect, significantly dilutes the requirement that the defendant demon-

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[9] The Second Circuit has expressly reserved ruling on the issue presented here (*United States* v. *Finkelstein, supra*), and there appears to be a conflict on the issue within the District of Columbia Circuit (compare *United States* v. *Bridgeman*, 523 F. 2d 1099, 1111-1112, with *United States* v. *Jones*, 524 F. 2d 834, 839-846).

[10] In each of the cases sustaining our position, the court also concluded that the defendant had failed to establish prejudice as a result of the pre-indictment delay, so that, strictly speaking, it is arguable that the statements regarding the cause of delay are only an alternative holding. Nevertheless, each of the courts has clearly expressed a view on the subject in direct conflict with the position of the court of appeals in the instant case.

[11] An additional difficulty inherent in the decision in this case is that it requires courts confronted with due process allegations based upon pre-accusation delay to determine the point at which the government possessed sufficient evidence to warrant submitting that evidence to the grand jury. In many cases, the making of such a determination would involve nearly insuperable problems. In almost all cases, moreover, lengthy hearings—similar in character to the trial itself—would be necessary before the required determination could be made with any assurance. See *United States* v. *Marion*, *supra*, 404 U.S. at 321, n. 13.

strate that the delay caused actual and substantial prejudice to his ability to defend against the charges. While it may sometimes be possible, and not unduly burdensome, for a court to determine with some assurance prior to trial whether the government sought to delay formal accusation to secure an improper tactical advantage, the same will seldom be true of allegations of defense prejudice. At a minimum, requiring the government to respond, prior to trial, to allegations that a particular delay impaired the accused's ability to defend against the charges will require a dress rehearsal of the trial itself. The resulting expenditure of judicial and prosecutorial resources, and the inevitable inconvenience to witnesses and others, is not required to vindicate the policies served by the Due Process Clause.

The dangers inherent in attempts to resolve due process claims prior to trial are, in fact, graphically illustrated by the decision below. At best, the majority's finding on the issue of defense prejudice rests upon unsubstantiated speculation concerning both the nature and strength of the government's case against respondent and respondent's anticipated defense.[12] Respondent made no effort at the hearing on his motion to dismiss to explain what information his brother or Tom Stewart might have provided that

[12] While we disagree with the conclusion that actual and substantial prejudice was established, we do not ask this Court to review that essentially factual conclusion, but rather the broader question of whether it was proper to arrive at such a conclusion as a result of a pre-trial hearing.

would have been favorable to his defense. In finding that respondent's ability to defend had been impaired by Stewart's death, the majority below relied upon respondent's contention—not made at or supported by the testimony at the hearing—that "were Stewart's testimony available it would support [respondent's] claim that he did not know that the guns were stolen from the United States mails" (App. A, *infra*, p. 5a).[13] But as Postal Inspector Wellner's report indicates, the person to whom respondent sold the guns (Joe Boaz) admitted during questioning that he had known that the guns were "hot" when he resold them. At trial, Boaz presumably would have been asked from whom he received that information and, since he had purchased the guns from respondent, the answer could well have shown that respondent also knew that the guns had been stolen.[14]

[13] To establish a violation of 18 U.S.C. 1708, the government need only have shown at trial that respondent knew that the guns had been stolen—not that they had been stolen from the United States mails. *Barnes* v. *United States*, 412 U.S. 837, 847.

[14] The Eighth Circuit apparently construes *Marion* as requiring courts to engage in "a process of balancing the reasonableness of the delay against any resultant prejudice to the defendant" (*United States* v. *Barket, supra*, 530 F. 2d at 193; quoting from *United States* v. *Jackson*, 504 F. 2d 337, 339 (C.A. 8), certiorari denied, 420 U.S. 964). Or, as explained in a more recent Eighth Circuit decision, "as the delay increases, the specificity with which prejudice must appear, diminishes" (*United States* v. *Naftalin*, No. 75-1692, decided March 30, 1976 (slip op. 6)). Although the majority did not in this case expressly state that it was balancing its assessment of prejudice against its assessment of

By countenancing resolution of respondent's due process claim prior to trial, the majority of the court below ignored the procedures suggested by this Court in *Marion*. In that case, as here, the defendants relied "solely on the real possibility of prejudice inherent in any extended delay; that memories will dim, witnesses become inaccessible, and evidence be lost" (404 U.S. at 325-326). This Court concluded, however, that while "[e]vents of the trial may demonstrate actual prejudice, * * * at the present time [defendants'] due process claims are speculative and premature" (*id.* at 326). The enhanced ability to make a sound assessment of claims of prejudice after trial, combined with the substantial economy of judicial and prosecutorial resources that will be accomplished by avoiding a lengthy pre-trial hearing that will inevitably be largely duplicative of the trial itself, prove the soundness of a rule, which we urge this Court to adopt, requiring that claims such as that of respondent normally be resolved after trial.

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the length or reasonableness of the delay, respondent's showing of prejudice fell far short of the showing that would have been required in other circuits to establish a violation of due process. See, *e.g.*, *United States* v. *McGough*, 510 F. 2d 598, 604 (C.A. 5) (mere allegation that several potential witnesses had died and the memories of others had faded held to constitute an insufficient showing of prejudice absent evidence of their potential utility to the defense); *United States* v. *Galardi*, 476 F. 2d 1072, 1075 (C.A. 9) (unexplicated claim that missing person might have been useful to the defense held insufficient); *United States* v. *Dukow*, *supra*, 453 F. 2d at 1330 (deaths of two potential witnesses insufficient to establish prejudice where the defense failed to show what their testimony would have been).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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JUNE 1976.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 75-1852

UNITED STATES OF AMERICA, APPELLANT

v.

EUGENE LOVASCO, SR., APPELLEE

Appeal from the United States District Court for the Eastern District of Missouri

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Submitted: January 16, 1976

Filed: February 23, 1976

Before CLARK, Associate Justice, Retired,* and BRIGHT and HENLEY, Circuit Judges.

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* TOM C. CLARK, Associate Justice, Retired, United States Supreme Court, sitting by designation.

BRIGHT, Circuit Judge.

The grand jury on March 6, 1975, indicted Eugene Lovasco, Sr., charging him with three counts of unlawful possession of handguns stolen from the mail, and one count of engaging in the business of dealing in firearms without a license, in violation of 18 U.S.C. §§ 922(a)(1) and 924(a). These indictments referred to eight handguns which Lovasco had possessed and then sold to a third party between July 25, 1973 and August 31, 1973, some 17 months before the indictment.

Prior to trial, Lovasco moved to dismiss the indictments because of prejudicial preindictment delay. The alleged offenses had been investigated by the postal inspector of the St. Louis, Missouri, post office department, between August 20, 1973, and October 2, 1973. During the investigation on September 26, 1973, a postal inspector interviewed Lovasco in the presence of his attorney and obtained a statement from him. The post office department sent a report of alleged offenses to the United States Attorney for the Eastern District of Missouri on October 2, 1973.

District Court Judge John K. Regan dismissed all counts of the indictment, noting that although the Government had possessed all of the information relating to the defendant's alleged commission of the offenses on or about October 2, 1973, it did not charge the defendant or present the matter to a grand jury until more than 17 months thereafter. The court concluded:

> As a result of the delay defendant has been prejudiced by reason of the death of Tom Stewart, a material witness on his behalf. The Government's delay has not been explained or justified and we find it unnecessary and unreasonable.[1]

Upon our review of the record, we affirm the district court's dismissal of counts one, two, and three (alleging unlawful possession of stolen handguns), but direct reinstatement of count four (dealing in firearms without a license).

In testimony supporting his motion for dismissal, Mr. Lovasco repeated in substance the statement that he had earlier made to postal authorities to the effect that after visiting his son, Eugene, Jr., a mail handler at the Clark Avenue mail facility of the Terminal Railroad Association, he found a sack in the back of his car containing Browning automatic pistols. Lovasco added to that earlier statement by testifying that he had received two or three of the automatic pistols from one Tom Stewart, now deceased, who had worked for the Terminal Railroad as did Lovasco. Lovasco stated that he had not mentioned to the postal inspector investigating the case that he received some of the guns from Stewart because as he described Stewart, "this guy was a bad tomato, he was liable to take a shot at me if I told him."

Some other information relative to Mr. Lovasco having sold a gun to another party surfaced in

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[1] The court's order is unpublished.

March of 1975, but that additional evidence does not seem to be embodied in any of the counts of the indictment. The postal inspector in charge of the case testified that he would have recommended the prosecution of this case and presentation of the evidence to the grand jury based on the information contained in the report submitted to the United States Attorney on October 2, 1973.

The prosecuting attorney has indicated that the Government theorized that the guns in question had come from the accused's son, who worked at the post office, but no charges have been made against him. At oral argument the prosecutor indicated the delay in the prosecution resulted from awaiting results of further investigation which might have implicated the person or persons who may have stolen the mailed matter.

We discussed preindictment delay in *United States* v. *Jackson*, 504 F.2d 337 (8th Cir. 1974), where we noted:

> The Supreme Court in *Marion* [*United States* v. *Marion*, 404 U.S. 307 (1971)] recognized that pre-prosecution delay on the part of the Government may have violated defendant's right to due process of law under the Fifth Amendment, and specifically declared that the statute of limitations does not fully define the rights of criminal suspects to be speedily accused. [*Id.* at 339.]

We added:

> Our court, too, has often recognized that an unreasonable pre-accusation delay, coupled with prejudice to the defendant, may violate the Fifth Amendment, although we have yet to hold in any case that the prejudice was sufficient to require reversal. [*Id.* at 339 (citations omitted).]

Here, the trial court found the two basic elements essential to a claim of preindictment delay—unreasonable delay and prejudice to one's ability to defend against the charges. Although the essential facts underlying the indictment were known to the Government and to the prosecutor on October 2, 1973, no prosecution was initiated for 17 months. No reason existed for the delay except a hope on the part of the Government that others might be discovered who may have participated in the theft of firearms from the United States mails. The postal inspector had submitted a prompt report to the prosecutor with documentations of facts uncovered in the investigation. The district court deemed the delay unjustified, unnecessary, and unreasonable. That determination is supported by the evidence.

Lovasco testified that one Tom Stewart, who is now dead, sold him two of the firearms in question, and contends that were Stewart's testimony available it would support his claim that he did not know that the guns were stolen from the United States mails. In support of the motion to dismiss, Lovasco testified that Stewart died about six months prior to April 25, 1975. The Government concedes that Tom Stewart did exist and was employed by the Terminal Railroad. While the Government does not concede Stewart's death, it does not claim to have any evi-

dence that he is now alive. Thus, the record also supports the district court's finding that the defendant has been prejudiced by reason of the death of Tom Stewart, a material witness on his behalf.

These findings of unreasonable delay and prejudice support the dismissal of counts one, two, and three of the indictment, but do not support dismissal of count four.

The fourth count charges Lovasco with dealing in firearms without a license as required by federal law. According to the investigation report, one Joe Boaz, Jr., stated that he had purchased eight pistols from Eugene Lovasco, Sr. on various dates between July 26, and September 11, 1973. In the statement given to the postal inspector, Lovasco admitted selling four or five pistols that he had found in his car to Joe Boaz, Jr., but denied selling any other pistols to him. In his testimony before the district court on the motion to dismiss, the accused admitted finding a bag of pistols in the car and obtaining two other pistols from Tom Stewart. He added, "and Joe Boaz bought them over the telephone."

As we understand it, the fourth count relates solely to the transaction between Lovasco and Boaz. Since Tom Stewart was not a participant in that transaction and the question of whether the guns were stolen is irrelevant to the charge, it is difficult to perceive any prejudice to Lovasco's defense because of the death of Stewart. Significantly, counsel for appellee conceded at the hearing before the district court that the fourth count is independent of

the other three counts. While counsel contended the fourth count could not stand on its own, that issue is not before us.

Accordingly, we sustain the dismissal of counts one, two, and three of the indictment, but direct the reinstatement of count four.

HENLEY, Circuit Judge, Dissenting.

I agree with the majority that the fourth count of the indictment against the defendant should be reinstated. I respectfully dissent from the view of the majority that the order of the district court should be affirmed to the extent that it dismissed the first three counts of the indictment.

With respect to those counts, my view is that the action of the district court in dismissing the first three counts in advance of trial on the theory that the defendant suffered prejudice as a result of an unreasonable preindictment delay on the part of the government was clearly erroneous. In my opinion the district court at most should have done no more than reserve ruling on the motion and let the case proceed to trial. Had the defendant been acquitted, the question of preindictment delay would not have survived; had he been convicted the question might well have been presented in clearer focus post trial than that in which it was presented in advance of trial and on the defendant's motion to dismiss.

Very recently in *United States* v. *Barket*, —— F. 2d —— (8th Cir. No. 75-1320 Jan. 28, 1976), a

majority of a panel of this court affirmed an order of the United States District Court for the Western District of Missouri dismissing for preindictment delay an indictment returned in 1974 charging that in 1970 the defendant, a bank official, unlawfully made a contribution of bank funds to a political campaign and that in so doing he misapplied the funds of the bank. The indictment in that case was returned within the applicable statutory period of limitations which at that time was five years.

As a member of the panel, I dissented in that case and filed an opinion setting out my general views as to the proper application to individual cases of the general rule laid down in *United States* v. *Marion*, 404 U.S. 307 (1971). I see no occasion to restate those views here except to repeat and emphasize my opinion that the fifth amendment protection against preindictment or preprosecution delays is not coextensive with the "speedy trial" protection accorded by the sixth amendment, and again call attention to the fact that the subject of a criminal investigation has no constitutional right to immediate prosecution or arrest. *See Hoffa* v. *United States*, 385 U.S. 293, 310 (1966), cited with approval in *United States* v. *Marion*, *supra*, 404 U.S. at 325.

Here, as in *Barket*, there is no evidence that the delay of the government in obtaining the indictment against the defendant, which delay the district court found was unreasonable, was motivated by any sinister desire on the part of the investigating officers or the United States Attorney to gain tactical advan-

tage over the defendant by means of the delay or to prejudice him in his defense. Nor is there any evidence of any detrimental reliance by the defendant on the fact that although a statement was taken from the defendant in September, 1973 and a report to the United States Attorney was made by postal authorities in October of that year, defendant was not indicted until March, 1975.

Further, the delay involved in this case was much shorter than the delay involved in *Barket*, and the offense for which the defendant was ultimately indicted arguably may be considered as more serious and involving more moral turpitude than the offenses charged against Mr. Barket.

Apart from those considerations, I think that the district court's finding that the defendant sustained substantial prejudice as the result of the death of Tom Stewart was purely speculative and for that reason was clearly erroneous.

The record and the briefs disclose that the indictment was returned on March 6, 1975; on March 18, 1975 defendant filed his motion to dismiss; and a hearing was held on the motion on April 25, 1975. In his brief counsel for defendant states that his client testified that Stewart had died about six months prior to the hearing. If so, Stewart had ceased to be a source of danger to the defendant, if he ever was, when the motion was filed. Nevertheless, no mention of Stewart or his "lost testimony" is made in the motion, and there is no allegation of specific prejudice in the motion except the assertion

that the defendant had suffered "anxiety and concern" since his statement had been taken in 1973. The name of Stewart seems to have come up for the first time when the defendant testified in support of his motion. In the circumstances, one may suspect that the claim of prejudice based on the death of Stewart was nothing but a fabrication, and that had Stewart been alive the defendant could just as well have relied on the recent death of any other of his acquaintances, claiming that he had innocently acquired the pistols from that acquaintance.

Defendant made no specific showing as to what he would have proved by Stewart had the latter been available, and in fact defendant made no showing that Stewart would have taken the stand in defendant's behalf had Stewart been alive and subject to subpoena.

Had Stewart taken the stand and undertaken to exculpate the defendant, he doubtless would have been required to explain his own connection, if any, with the pistols in question, and that connection may well have been highly culpable. The defendant could not have compelled Stewart to incriminate himself, and it is unrealistic to believe that Stewart would have done so voluntarily simply to aid or accommodate the defendant.

If the defendant had been put to trial, it would have been open to him to contend before the jury that he had acquired the pistols from Stewart without any guilty knowledge and to urge upon the jury the fact that Stewart's death had deprived defendant of the

benefit of Stewart's testimony. As it is, the defendant simply goes free without trial.

When a district judge sustains in advance of trial a motion to dismiss an indictment because of prejudicial pre-indictment delay, he takes a stringent measure. And if such a motion is improvidently granted, it adversely affects the public interest in the enforcement of the criminal law, and it also encourages the filing of meritless motions, similarly based, by other defendants. The dismissing of indictments on account of the government's delay in obtaining them is not an acceptable solution to the problem of crowded criminal calendars, and in my opinion motions such as that of the defendant should not be granted in advance of trial except in clear cases.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SEPTEMBER TERM, 1975

No. 75-1852

THE UNITED STATES, APPELLANT

vs.

EUGENE LOVOSCO, SR., APPELLEE

Appeal from the United States District Court for the Eastern District of Missouri

JUDGMENT

This cause came on to be heard on the original designated record of the United States District Court for the Eastern District of Missouri and briefs of the respective parties and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the dismissal of the said District Court of Counts One, Two and Three in this cause is hereby affirmed in accordance with the majority opinion of this Court.

And it is further ordered by this Court that Count Four (dealing in firearms without a license) be and is hereby reinstated with the majority opinion of this Court.

February 23, 1976

A true copy.
Attest:

/s/ Robert C. Tucker
Clerk
U. S. Court of Appeals
8th Circuit
April 28, 1976

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SEPTEMBER TERM, 1975

75-1852

THE UNITED STATES, APPELLANT

v.

EUGENE LOVASCO, SR., APPELLEE

Appeal from the United States District Court for the Eastern District of Missouri

The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

April 21, 1976

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 75-66 CR (2)

UNITED STATES OF AMERICA, PLAINTIFF

v.

EUGENE LOVASCO, SR., DEFENDANT

ORDER

This matter is before the Court on motion of defendant to dismiss the indictment under Rule 48 (b), F.R.CR. P.

A hearing was held on the motion. The evidence disclosed and we find that as of September 26, 1973, and in no event later than October 2, 1973, the Government had all the information relating to defendant's alleged commission of the offenses charged against him, but did not charge defendant or present the matter to a grand jury until more than 17 months thereafter. The indictment was returned March 6, 1975.

As a result of the delay defendant has been prejudiced by reason of the death of Tom Stewart, a material witness on his behalf. The Government's delay has not been explained or justified and we find it unnecessary and unreasonable.

Accordingly, IT IS HEREBY ORDERED that defendant's motion be and the same is hereby SUSTAINED, and the indictment is hereby dismissed.

/s/ John K. Regan
United States District Judge

Dated this 8th day of October, 1975.

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